

DEPARTMENT OF HEALTH SERVICES

714/744 P Street
P.O. Box 942732
Sacramento, CA 94234-7320
(916) 657-2941



December 1, 1995

TO: All County Welfare Directors
All County Administrative Officers
All County Medi-Cal Program Specialist/Liaisons

Letter No: 95-75

**IMPLEMENTATION OF THE OMNIBUS BUDGET RECONCILIATION ACT OF 1993
(OBRA '93) TRUST AND ANNUITY PROVISIONS**

The purpose of this letter is to provide counties with the pertinent provisions of OBRA '93. Proposed regulations have been submitted to the Office of Regulations, and the public hearing will be held January 10, 1996. Counties shall implement these additional provisions relating to trusts and annuities in accordance with the enclosed proposed regulations developed by the Department of Health Services (Department).

Title 22, California Code of Regulations, Section 50489, currently addresses property held in trust. Section 50489.1 of the proposed regulations concerns Medicaid Qualifying Trusts that were established prior to August 11, 1993. Those provisions relating to trusts established prior to August 11, 1993 have already been implemented by the counties and do not require additional changes. However, the Department is rewriting Section 50489 to incorporate the provisions of OBRA '93.

Counties shall implement OBRA '93 provisions on March 1, 1996 for Medi-Cal applications and redeterminations. Counties shall not calculate potential overpayments that result from the delay in implementing these provisions for trusts established or annuities purchased prior to March 1, 1996. In cases involving adverse actions, counties must flag the case and make changes on a prospective basis and provide adequate ten-day notice of the adverse action. The Department will advise counties of any post-hearing changes that may affect those flagged cases and provide additional instructions at that time.

PLEASE NOTE: These guidelines contain undue hardship provisions developed by the Department in accordance with guidelines established by the Secretary of the Department of Health and Human Services. Among other things, these guidelines specify that no one shall be made ineligible because otherwise exempt assets are held in trust. The undue hardship provisions also specify that Section 50402 will continue to apply to any annuity purchased prior to the date of implementation (March 1, 1996).

Finally, counties shall ignore all references to the transfer of income provisions in OBRA '93 until additional instructions are provided by the Department.

ACTION: Notice of Proposed Rulemaking

SUBJECT: Property Held in Trusts (R-20-94)

PUBLIC PROCEEDINGS: Notice is hereby given that the California Department of Health Services will conduct a public hearing commencing at 10:00 a.m. on January 10, 1996 in the auditorium at 714 P Street, Sacramento, CA, during which time any interested person or such person's duly authorized representative may present statements, arguments or contentions relevant to the action described in this notice. Any written statements, arguments, or contentions must be received by the Office of Regulations, Department of Health Services, 714 P Street, Room 1000, P.O. Box 942732, Sacramento, CA 94234-7320, by 5:00 p.m. on January 10, 1996, which is hereby designated as the close of the written comment period. It is requested but not required that written statements, arguments or contentions, be submitted in triplicate.

CONTACT: Inquires concerning the action described in this notice may be directed to Ron C. Wetherall, Chief, Office of Regulations at (916) 657-0692. In any such inquiries, please identify the action by using the Department regulation control number R-20-94.

INFORMATIVE DIGEST: This proposed regulation package repeals the current Title 22, California Code of Regulations (CCR), Section 50489, and adopts new Sections 50489 through 50489.9. These regulations are necessary to comply with amendments to the federal Social Security Act, Sections 1917(d) and 1917(e) [Title 42, United States code (USC) Section 1396p(d) and 1396p(e)] contained in Section 13611 of the Omnibus Budget Reconciliation Act of 1993 (OBRA '93).

Title 42, USC, Section 1396p(d) defines the treatment of trusts established on or after August 11, 1993. Title 42, USC, Section 1396 a(k), repealed by Section 13611, defined a Medicaid Qualifying Trust (MQT) and stipulated the treatment of trusts established prior to OBRA '93. Trusts established while Title 42, USC, Section 1396 a(k), was in effect continue to be treated as MQTs. For trusts not contained under in Title 42, USC, Sections 1917(d) or 1917(e) or for trusts not deemed MQTs, federal law at Title 42, USC, Section 1396a(r)(2)(A) requires states' eligibility requirements to be no more restrictive than the cash assistance programs. Supplemental Security Income (SSI), the cash assistance program, does not count amounts in irrevocable trusts until distributed. SSI counts the full amount held in revocable trusts as available to the person who has the legal right, power, and authority to revoke the trust. Title 20, Code of Federal Regulations, Section 416.1201(a)(1) and the Program Operations

Manual System Section S1 01120.200 specify how trusts are to be evaluated for the SSI program.

Section 50489 is being modified to provide a general description of a trust and the terms associated with a trust. Section 50489.1 is being adopted to replace 50489 and sets forth the treatment of funds held in a trust or similar legal device when the trust is established prior to August 11, 1993. Section 50489.5 is being adopted to set forth the treatment of funds held in a trust established on or after August 11, 1993. Finally, Section 50489.9 sets forth the treatment of all other trusts and two types of trusts excepted from OBRA '93 treatment.

AUTHORITY: Sections 10725 and 14124.5, Welfare and Institutions Code.

REFERENCE: Sections 14005.7, 14006 and 14015(a), Welfare and Institutions Code; and Sections 1396a(k), 1396(r)(2)(A) and 1396 p(c), (d) and (e), Title 22, United States Code.

FISCAL IMPACT ESTIMATE:

- A. Fiscal Effect on Local Government: None.
- B. Fiscal Effect on State Government: Indeterminate savings to the Medi-Cal program.
- C. Fiscal Effect on Federal Funding of State Programs: Indeterminate savings to the Medi-Cal program.
- D. Fiscal Effect on Private Persons or Businesses Directly Affected: None.

DETERMINATIONS: The Department has determined that the regulations would not impose a mandate on local agencies or school districts, nor are there any costs for which reimbursement is required by Part 7 (commencing with Section 17500) of Division 4 of the Government Code.

The Department has determined that the regulations would not have a significant adverse economic impact on businesses, including the ability of California businesses to compete with businesses in other states.

The Department has determined that the regulations would not significantly affect the following:

- (1) The creation or elimination of jobs within the State of California.

(2) The creation of new businesses or the elimination of existing businesses within the State of California.

(3) The expansion of businesses currently doing business within the State of California.

The Department has determined that the regulations would not affect small business because the regulations apply only to Medi-Cal eligibility determinations, which apply to individuals, not businesses.

AVAILABILITY OF STATEMENT OF REASONS AND TEXT OF REGULATIONS: The Department has prepared and has available for public review an initial statement of reasons for the proposed regulations, all the information upon which the proposed regulations are based, and the text of the proposed regulations. A copy of the initial statement of reason and a copy of the text of the proposed regulations are available upon request by writing to the Office of Regulations at the address noted above, which address will also be the location of public records, including reports, documentation, and other material related to the proposed regulations.

AVAILABILITY OF CHANGED OR MODIFIED TEXT: The full text of any regulation which is changed or modified from the express terms of the proposed action will be made available by the Department's Office of Regulations at least 15 days prior to the date on which the Department adopts, amends, or repeals the resulting regulation.

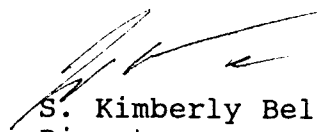
ADDITIONAL STATEMENTS AND COMMENTS: In accordance with Government Code Section 11346.5 (a) 12 the Department must determine that no alternative considered by the Department would be more effective in carrying out the purpose for which the action is proposed or would be as effective and less burdensome to affected private persons than the proposed action.

Other regulation changes may be scheduled for hearing at the same time appointed for public hearing on the action described in this notice. An agenda for the public hearing will be posted at the time and place of hearing designated above.

DEPARTMENT OF HEALTH SERVICES

R-20-94

Dated: October 10, 1995


S. Kimberly Belshé
Director

All County Welfare Directors
All County Administrative Officers
All County Medi-Cal Program Specialist/Liaisons
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If you have any questions relating to this letter, please call Sharyl Shanen-Raya at (916) 657-2942 or Kathy Harwell at (916) 657-0146.

Sincerely,

ORIGINAL SIGNED BY

Frank S. Martucci, Chief
Medi-Cal Eligibility Branch

Enclosures

INITIAL STATEMENT OF REASONS

This proposed regulation package repeals Title 22, California Code of Regulations (CCR), Section 50489 and adopts new Sections 50489 - 50489.9 to comply with Sections 1396a(r)(2)(A), 1396p(d) and 1396p(e), Title 42, United States Code (USC). These regulation additions and changes provide general definitions of trust terms, and establish criteria for determining the treatment of trusts for purposes of Medi-Cal eligibility. These changes are necessary to ensure conformity with, and statewide implementation of Sections 1396p(d) and 1396 p(e). Failure to make these changes would render the Medi-Cal program out of compliance with federal law, resulting in quality control errors, and potential loss of federal financial participation.

Under proposed Section 50489, treatment of trusts are classified into three types: trusts established prior to August 11, 1993 (Medicaid Qualifying Trusts (MQT) - Section 1396a(k), Title 42, USC); trusts established on or after August 11, 1993 (OBRA '93 Trusts - Sections 1396p(d) and 1396p(e), Title 42, USC); and trusts that are not MQT's or OBRA '93 trusts (Section 1396a(r)(2)(A), Title 42, USC).

Under proposed Section 50489, placement of assets in, or distributions from, a trust other than a burial trust, will be considered a transfer of assets. This proposed Section also outlines the verification of written and oral trusts. Written trusts shall be verified by examining the trust document or other documents which substantiate investments and distributions. Oral trusts shall be verified by written affidavit or other documents which substantiate investments and distributions. (Sections 1396a(r)(a)(2)(A), 1396p(d) and 1396p(e), Title 42, USC.)

The proposed Section 50489.1 is being adopted to replace existing Section 50489 regarding MQTs. The proposed section continues to set forth the treatment of funds held in a trust or similar legal device. The maximum amount the trustee can distribute under the terms of the MQT is still considered available property, regardless of whether that amount is actually distributed. (Title 42, USC, Section 1396 a(k), repealed by Section 13611, defined a Medicaid Qualifying Trust (MQT) and stipulated the treatment of trusts established prior to OBRA '93. Trusts established while Title 42, USC, Section 1396 a(k) was in effect continue to be treated as MQTs.)

The proposed Section 50489.5 sets forth the treatment of funds held in trust established on or after August 11, 1993, which meet the criteria of an OBRA '93 trust. The maximum amount the trustee can distribute under the terms of the trust is considered available property, regardless of whether the amount is actually distributed. Payment from the trust to or for the benefit of the individual or spouse is considered income. If payment of the trust principle or income cannot be made to the individual or spouse, the payment shall be considered a transfer of assets. (Sections 1396p(d) and 1396p(e), Title 42, USC.)

The proposed Section 50489.5 sets forth the treatment of funds held in an annuity. All payments distributed from the annuity are considered income in accordance with Section 50507, Title 22, CCR. The undistributed balance of the annuity shall be unavailable if the annuity contract is annuitized based on the life expectancy of the annuitant. (Section 1396p(e), Title 42, USC.)

The proposed Section 50489.5 provides for undue hardship. (Sections 1396p(d), Title 42, USC.)

The proposed Section 50489.9 sets forth the treatment of trusts not described Sections in 50489.1 and 50489.5 and provides for three additional types of trusts: 1) trusts established prior to April 7, 1986, solely for the benefit of mentally retarded individuals, 2) trusts established on or after August 11, 1993, solely for the benefit of disabled individuals, and 3) accounts in pooled trusts established on or after August 11, 1993, for disabled individuals or disabled spouses, which are managed by a non-profit organization responsible for management and investment. (Section 1396a(r)(2)(A), Title 42, USC.)

STATEMENT OF DETERMINATIONS

Alternatives Considered

The Department has determined that no alternative considered by the Department would be more effective in carrying out the purpose for which the action is proposed or would be as effective and less burdensome to affected private persons than the proposed action.

Local Mandate Determination

The proposed regulations do not impose a mandate on local agencies or school districts.

Economic Impact Statement

The Department has determined that the regulations would not have a significant adverse economic impact on businesses, including the ability of California businesses to compete with businesses in other states.

The Department has determined that the regulations would not significantly affect the following:

The creation or elimination of jobs within the State of California. These regulations apply only to Medi-Cal eligibility determinations, which apply to individuals, and do not affect the California job market.

The creation of new businesses or the elimination of existing businesses within the State of California. These regulations affect Medi-Cal applicants and beneficiaries only, not owners, operators, employers, clients or customers of businesses and do not affect new or existing businesses in California.

The expansion of businesses currently doing business within the State of California. These regulations are the result of the Department's intent to comply with federal law governing the Medi-Cal program and do not affect the expansion of businesses in California.

Affect on Small Business

The Department has determined that the regulations would not have a significant adverse economic impact on small businesses. These regulations apply only to Medi-Cal eligibility determinations, which apply to individuals, not to businesses. These regulations affect Medi-Cal applicants and beneficiaries only, not owners, operators, employees, clients or customers of businesses. These regulations are the result of the Department's intent to comply with federal law governing the Medi-Cal program.

REPEAL SECTION 50489 AS FOLLOWS:

~~§ 50489. Property Held in Trust.~~

~~(a) A Medicaid Qualifying Trust (MQT) is a trust or similar legal device (SLD) which:~~

~~(1) is established prior to August 11, 1993, other than by will, by an individual or the individual's spouse, or by the individual's guardian, conservator, or legal representative who is acting on the individual's behalf;~~

~~(2) provides that the individual may receive all or part of the payment from the trust, either directly or to another person or entity on behalf of the individual; and~~

~~(3) gives the trustees any discretion in distributing funds to the individual or to another person or entity on behalf of the individual.~~

~~(b) For purposes of this section, "individual" means a person who establishes or whose spouse establishes an MQT or SLD, and who is a beneficiary of the MQT or SLD.~~

~~(c) An MQT may be revocable or irrevocable.~~

~~(d) An MQT may be established to enable the individual to qualify for Medi-Cal, or for some other purpose.~~

~~(e) Any trust established prior to April 7, 1986, solely for the benefit of a mentally retarded person who resided in an intermediate care facility for the mentally retarded, is not an MQT.~~

~~(f) A written MQT shall be verified by viewing the trust documents and other documents which substantiate any investments and distributions.~~

~~(g) An oral MQT shall be verified by written affidavit and by other documents which substantiate any investments and distributions. Affidavits shall be dated and signed under penalty of perjury, and shall specify the terms of the oral MQT. Affidavits may be obtained from the individual and from any other person who knows the terms of the MQT. Real property cannot be held in an oral MQT. Oral MQTs which are held in financial institutions are subject to the requirements of Section 50402.~~

~~(h) An SLD is an oral or written arrangement under which an individual transfer property to a person who has legal responsibility to manage the property for the benefit of the individual.~~

~~(1) An SLD has the characteristics of subdivision (a).~~

~~(2) An arrangement may be an SLD even if it is not called a trust and does not qualify as a trust under state law.~~

~~(3) A written SLD shall be verified by viewing the documents which established it and other documents which substantiate any investments and distributions.~~

~~(4) An oral SLD shall be verified by written affidavit and by other documents which substantiate any investments and distributions. Affidavits shall be dated and signed under penalty of perjury, and shall specify the terms of the oral SLD. Affidavits may be obtained from the individual and from any other person who knows the terms of the SLD. The county department may request additional documentation of the terms of the SLD. Real property cannot be held in an oral SLD. Oral SLDs which are held in financial institutions are subject to the requirements of Section 50402.~~

~~(i) Property in an MQT or SLD is available as specified below:~~

~~(1) If the MQT or SLD is revocable, it is available.~~

~~(2) If the MQT or SLD is irrevocable:~~

~~(A) Any amount distributed from the principal of the MQT or SLD to the individual or to another person or entity on behalf of the individual is available property.~~

~~(B) Any amount distributed from the income of the MQT or SLD to the individual or to another person or entity on behalf of the individual is income and is subject to Article 10.~~

~~(C) The maximum amount that the trustee may distribute if the trustee were to exercise full discretion under the terms of the MQT or SLD, but which is not distributed, is available property.~~

~~(j) A trust which is not an MQT or SLD shall be verified as provided in subdivisions (f) and (g).~~

~~(k) Property in a trust which is not an MQT or SLD is available as specified below:~~

~~(i) If the trust is revocable, it is available to the person who has the legal right, authority, or power to revoke the trust.~~

~~(2) If the person has no legal right, authority, or power to revoke the trust or to obtain the property, the property is not available until it has been distributed.~~

~~(3) Trust income is income, and is subject to Article 10. If not distributed in the month of receipt, trust~~

~~income is property.~~

~~(l) A transfer of property into a trust, an MQT or an SLD may result in a period of ineligibility for nursing facility level of care pursuant to Title 22, United States Code, Section 1396p(c).~~

~~(m) A transfer of property into an exempt burial trust in accordance with section 50479 shall not result in a period of ineligibility for nursing facility level of care.~~

~~NOTE: Authority cited: Sections 10725 and 14124.5, Welfare and Institutions Code. Reference: Sections 14005.7, 14006 and 14015(a), Welfare and Institutions Code; and Sections 1396 a(k), 1396(r)(2)(A) and 1396p(c), Title 42, United States Code.~~

ADOPT A NEW SECTION 50489 TO READ AS FOLLOWS:

§ 50489. Trusts - General.

(a) Property and income held in trust for the benefit of an individual or individual's spouse shall be treated in accordance with Sections 50489 through Section 50489.9. These sections shall supersede any other section(s) of this article.

(b) For purposes of sections 50489 through 50489.9 the following definitions apply:

(1) "Assets" shall mean all income and property of the individual or the individual's spouse, including income or property which the individual or spouse is entitled to, but does not receive because of circumstances brought about by:

(A) the individual or the individual's spouse, or

(B) other individual or entity, including a court or administrative body, with legal authority to act in place of, or on behalf of, the individual or the individual's spouse, or

(C) other individual or entity, including any court or administrative body, acting at the direction or upon the request of the individual or the individual's spouse.

(2) "Trust" means any arrangement in which an individual or entity (trustor) transfers assets to a trustee or trustees with the intent that the assets be held, managed, or administered by the trustee(s) for the benefit of the trustor or certain designated individuals (beneficiaries). The trust must be valid under State law. The term "trust" also includes any legal instrument or device similar to a trust as described in subsection (3) below.

(3) "Similar legal device" (SLD) means any legal instrument, device or arrangement that involves the transfer of assets from an individual or entity (transferor) to another individual or entity (transferee) with the intent that the assets be held, managed, or administered by an individual or entity for the benefit of the transferee. This also includes annuities purchased on or after August 11, 1993.

(4) "Revocable trust" means a trust which can be revoked by its own terms.

(5) "Irrevocable trust" means a trust which cannot be revoked by its own terms.

(6) "Trustor" means an individual who creates a trust. A trustor is also known as the "settlor" or "grantor".

(7) "Beneficiary" means any individual or individuals, designated in the trust instrument as benefitting in some way from the trust.

(8) "Trustee" means any individual(s), entity, trust advisory committee, or individual(s) with power of appointment, who manages, holds, or administers a trust for the trust beneficiary.

(c) For purposes of this article, trusts shall be classified in three ways:

(1) Medicaid Qualifying Trusts (MQT): A trust established prior to August 11, 1993, as described in Section 50489.1.

(2) OBRA 93 Trusts: A trust established on or after August 11, 1993 as described in Section 50489.5.

(3) Other Trusts: A trust other than those in (1) or (2) as described above.

(d) Placement of assets in, or distributions from, a trust other than a burial trust which is exempt pursuant to Section 50479, shall be considered a transfer of assets.

(e) Trust verification shall be performed by the county in accordance with subsection (1) and (2) below.

(1) A written trust shall be verified by examining the trust documents and any other related documents.

(2) An oral trust shall be verified by written affidavit and by any other related documents. Affidavits shall be dated and signed under penalty of perjury, and shall specify the terms of the oral agreement. Real property cannot be held in an oral trust. Oral trusts which are held in financial institutions are subject to the requirements of Section 50402.

NOTE: Authority cited: Sections 10725 and 14124.5, Welfare and Institutions Code. Reference: Sections 14005.7, 14006 and 14015(a), Welfare and Institutions Code; and Sections 1396 a(k), 1396(n)(2)(A) and 1396p(c), (d) and (e), Title 42, United States Code.

ADOPT A NEW SECTION 50489.1 TO READ AS FOLLOWS:

§ 50489.1. Medicaid Qualifying Trusts.

(a) A Medicaid Qualifying Trust (MQT):

(1) Is established prior to August 11, 1993, other than by will, by an individual or the individual's spouse, or by the individual's guardian, conservator, or legal representative who is acting on the individual's behalf; and which

(2) Provides that the individual or the spouse may receive all or part of the income or principal of the trust, that is dispersed directly or to another person or entity on behalf of that individual; and which

(3) Gives the trustee(s) discretion in distributing funds to the individual or to the spouse or to another person or entity on behalf of that individual; and

(4) Is not described in Section 50489.9, and

(5) Shall be treated in accordance with subsections (b) through (e) below.

(b) For purposes of this section, "individual" means a person or spouse who establishes an MQT and who is a beneficiary of the MQT.

(c) An MQT may be revocable or irrevocable.

(d) An MQT may be established to enable the individual or the spouse to qualify for Medi-Cal.

(e) Property in an MQT is available as specified below:

(1) If the MQT is revocable, it shall be available.

(2) If the MQT is irrevocable then:

(A) Any amount distributed from the principal of the MQT to the individual or to the spouse or to another person or entity on behalf of that individual or spouse shall be available property.

(B) Any amount distributed from the income of the MQT to the individual or to the spouse or to another person or entity on behalf of that individual or spouse shall be considered income and shall be subject to Article 10.

(C) The maximum amount that the trustee(s) could distribute to the individual or to the spouse or to another person or entity on behalf of that individual or spouse from trust principal shall be considered available

property. The maximum amount is the amount the trustee(s) may distribute if the trustee(s) were to exercise full discretion under the terms of the MQT.

(D) The maximum amount that the trustee(s) may distribute to the individual or to the spouse or to another person or entity on behalf of that individual or spouse from trust income if the trustee(s) were to exercise full discretion under the terms of the MQT is available income and is subject to Article 10.

(E) Any amount of trust principal for which the trustee(s) has no discretion to release to the individual or to the spouse or to another person or entity on behalf of that individual or spouse shall be considered a transfer of property. The date of the transfer shall be the date the trust was established or the date disbursement is discontinued, whichever is the most recent.

(F) Any amount of trust income for which the trustee(s) has no discretion to release to the individual or to the spouse or to another person or entity on behalf of that individual or spouse shall be considered a transfer of assets. The date of the transfer shall be the date trust disbursement is discontinued, or the date the trust receives income, whichever is the most recent. Transfers of income occurring prior to August 11, 1993, shall not be considered.

NOTE: Authority cited: Sections 10725 and 14124.5, Welfare and Institutions Code. Reference: Sections 14005.7, 14006 and 14015(a), Welfare and Institutions Code; and Sections 1396 a(k), 1396(r)(2)(A) and 1396p(c), (d) and (e). Title 42, United States Code.

ADOPT A NEW SECTION 50489.5 TO READ AS FOLLOWS:

§ 50489.5. OBRA 93 Trusts Established On Or After August 11, 1993.

(a) An OBRA 93 trust:

(1) Is established, in part or in whole with assets of an individual or individual's spouse, on or after August 11, 1993, other than by will; and

(2) Is not described in Section 50489.9, and

(3) Shall be treated in accordance with the remainder of this section.

(b) The provisions of this section shall apply to OBRA 93 trusts without regard to:

(1) the purpose for which the trust is established,

(2) whether the trustee(s) has, or exercises, any discretion under the terms of the trust,

(3) restrictions on when, or whether, distributions may be made from the trust, or

(4) restrictions on the use of trust assets or distributions.

(c) The provisions of this section shall apply to any OBRA 93 trust if it was established by any of the following:

(1) the individual, or

(2) the individual's spouse, or

(3) other person or entity, including a court or administrative body, with legal authority to act in place of, or on behalf of, the individual or the individual's spouse, regardless of whether that person or entity claims to be acting in such a capacity at the time of the action, or

(4) other person or entity, including any court or administrative body, acting at the direction, or upon the request of, the individual or the individual's spouse.

(d) In the case of an OBRA 93 trust which includes the assets of someone other than the individual or the individual's spouse, the provisions of this section shall apply only to that portion of the trust containing the assets of the individual or the individual's spouse.

(e) In the case of a revocable OBRA 93 trust:

(1) the principal and income of the trust shall be considered property available to the individual or spouse, and

(2) payments from the trust to, or for the benefit of, the individual or spouse shall be considered income of that individual or spouse in accordance with Article 10 of this chapter, and

(3) if payments are made to any person or entity, other than the individual or spouse, for any purpose other than for the benefit of the individual or spouse, those payments shall be considered a transfer of assets,

(f) In the case of an irrevocable OBRA 93 trust:

(1) if payment(s) can be made from the trust to or for the benefit of the individual or spouse at any time or under any circumstances, the portion of the trust income or principal from which payment(s) to the individual or spouse could be made shall be considered property available to that individual,

(2) if payment(s) from the trust income or principal is made to or for the benefit of the individual or spouse, the payment(s) shall be considered income of that individual in accordance with Article 10 of this chapter,

(3) if payment(s) is made from the trust income or principal for any other purpose, the payment(s) shall be considered a transfer of assets by the individual or spouse, and

(4) if any portion of the trust income or principal from which payment cannot be made to, or for the benefit of the individual or spouse, then that portion shall be considered a transfer of assets. The value of the assets transferred shall include the amount of assets used to establish the trust and any assets added to that portion. Payments which have been made from that portion of the trust shall not be deducted from the value of the assets transferred.

(g) In the case of an annuity:

(1) Payments shall be considered income in accordance with Article 10, and

(2) Section 50402 shall apply only to the extent that it is not inconsistent with subsections (A) - (D) below.

(A) The undistributed balance of the annuity shall be considered unavailable if the annuity contract is annuitized upon the life expectancy of the individual or spouse or for a shorter period of time.

(B) The life expectancy of the annuitant shall be determined in accordance with life expectancy tables specified by the Secretary of the Department of Health and Human Services.

(C) Any payment scheduled to occur beyond the life expectancy of the individual or spouse, as

determined in accordance with subsection (3) above, shall be considered a transfer of assets.

(D) Any payment made to, or set aside for, another individual (other than for the sole benefit of the spouse), shall be considered a transfer of assets.

(h) The provisions of this section may be waived if the individual demonstrates that the application of these provisions would work an undue hardship. For purposes of this section, undue hardship exists when all of the conditions in subsections (1) through (4) exist or when the condition in subsections (5) or (6) exist;

(1) the trust assets cannot, under any circumstances, be used to provide for the health care or medical needs of the individual or spouse, and

(2) health care cannot be obtained from, and medical needs cannot be met by, any source other than Medi-Cal without depriving the individual of food, clothing or shelter or other necessities of life, and

(3) the individual's parents (if the individual is under 21) or the individual's spouse, cannot provide for the health care and medical needs, or health care coverage of the individual without depriving themselves of food, clothing or shelter or other necessities of life, and

(4) the courts have denied a good faith petition to release the trust assets to pay for the required medical care.

(A) A petition to release the trust assets shall not be considered a valid good faith petition if the petition contains language which suggests or requests that the courts do anything other than release the trust assets needed to pay for the required medical care.

(B) The counties shall verify by examining the petition and the court order.

(C) Subsection (h)(4) does not apply to an annuity.

(5) No person shall be made ineligible to the extent the trust contains otherwise exempt income or property.

(6) No person shall be made ineligible due to the application of subsection (g) above concerning an annuity purchased prior to the implementation date of these regulations when the annuity cannot be annuitized to comply with the provisions of subsection (g). Any annuity purchased prior to the implementation date of these regulations which cannot be annuitized to comply with the provisions of subsection (g), shall continue to be considered in accordance with Section 50402.

NOTE: Authority cited: Sections 10725 and 14124.5, Welfare and Institutions Code. Reference: Sections 14005.7, 14006 and 14015(a), Welfare and Institutions Code; and Sections 1396 a(k), 1396(r)(2)(A) and 1396p(c), (d) and (e), Title 42, United States Code.

ADOPT A NEW SECTION 50489.9 TO READ AS FOLLOWS:

§ 50489.9. Trusts Other Than Those Described In 50489.1 Or 50489.5.

(a) Trusts described in subsections (a)(1) through (a)(4) below shall be considered available in accordance with subsection (c):

(1) Trusts that are not described in Section 50489.1, or Section 50489.5.

(2) Any trust established prior to April 7, 1986, solely for the benefit of a mentally retarded person who resides in an intermediate care facility for the mentally retarded.

(3) A trust established on or after August 11, 1993, which meets all of the following conditions:

(A) A trust that contains the assets of an individual or spouse who was both disabled as verified in accordance with Section 50167(a)(1) and under the age of 65 when the trust was established and who is currently disabled whether or not he/she is age 65 or over, and

(B) A trust that is established for the benefit of the disabled individual or disabled spouse in subsection (a)(1)(A) of this Section by a parent, grandparent, legal guardian of the individual, or a court, and where

(C) the State receives all remaining funds in the trust upon the death of the individual or spouse or upon termination of the trust up to an amount equal to the total medical assistance paid on behalf of that individual by the Medi-Cal program.

(4) A trust established on or after August 11, 1993, which meets all the conditions listed in subsections (A) through (E):

(A) the trust contains the assets of the individual or spouse who is disabled as verified in accordance with Section 50167(a)(1), and

(B) the trust is established and managed by a nonprofit association, and

(C) a separate account is maintained for each trust beneficiary, but for purposes of investment and management of funds, the trust pools these accounts, and

(D) the accounts in the trust are established solely for the benefit of the disabled individual or disabled spouse, as defined in subsection (b) below, by the disabled individual or disabled spouse, his or her parents, his or her grandparents, or the legal guardian of that individual, or by a court, and

(E) the State receives upon the death of the disabled individual or disabled spouse all funds remaining in the individual's account, up to an amount equal to the total amount of medical assistance paid on behalf of that individual by the Medi-Cal program. The State shall receive this amount only to the extent that funds remain in that individual's account and are not retained by the trust to cover management and investment fees associated with that account.

(b) In determining whether a trust or an account may be considered solely for the benefit of the mentally retarded or disabled individual or disabled spouse both subsections (A) and (B) below shall apply.

(A) Except in accordance with subsection (4) (E) above, the trust or account funds must benefit no one other than the mentally retarded or disabled individual or disabled spouse for whose benefit the trust or account was established. Other individuals may benefit from the account only after the State's interest has been satisfied pursuant to subsection (4) (E) above.

(B) If the trust permits funds to be used for any purpose, other than for the sole benefit of the mentally retarded or disabled individual or disabled spouse for whose benefit the trust or account was established, the trust or account will not be considered solely for the benefit of that individual or spouse. Such trusts or accounts shall be treated pursuant to Section 50489.5. A trust or account will still be considered for the benefit of the individual or spouse if the trust permits funds to be used for other purposes when the trust's terms permit such use only after payment of the State's interest pursuant to subsection (4)(E).

(c) Trusts described in subsections (a)(1) through (a)(4) above shall be considered available as specified below.

(1) A trust is revocable, if it is available to a person who has the right, power, and authority to revoke the trust and to use the proceeds.

(A) Trust income is income, and is subject to Article 10. If trust income is not distributed in the month of receipt, it is available property.

(B) Trust principal is available property.

(2) If the trust is irrevocable, the trust assets are not available until distributed.

(d) Any augmentations or additions made to a trust described in subsections (a)(3) or (a)(4) after the

disabled individual or disabled spouse, for whose benefit the trust was established, reaches the age of 65, shall be considered a transfer of assets for less than adequate consideration.

(e) In the case of a trust described in subsection (a)(3) or (a)(4) above, to ensure that the Department recovers the costs of medical care it provided, the Department's, Third Party Liability Branch, shall be notified

(1) by the county, whenever the county becomes aware of a Medi-Cal applicant or Medi-Cal beneficiary who is a trust beneficiary, and

(2) by the trustee, upon death of the trust beneficiary, termination of the trust or change of trustee.

NOTE: Authority cited: Sections 10725 and 14124.5, Welfare and Institutions Code. Reference: Sections 14005.7, 14006 and 14015(a), Welfare and Institutions Code; and Sections 1396 a(k), 1396(r)(2)(A) and 1396p(c), (d) and (e), Title 42, United States Code.